IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 446

WILLIS ALLEN, ROY G. OWENS, and CAMPAIGN COMMITTEE FOR CALIFORNIA BILL OF RIGHTS INITIATIVE CONSTITUTIONAL AMENDMENT, INC., a corporation,

Petitioners,

v.

ARTHUR JAMES McFADDEN and FRANK M. JORDAN as Secretary of the State of California,

Respondents.

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT JORDAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

The respondent Frank M. Jordan is the Secretary of State of the State of California, and appearance is made on his behalf by the Attorney General of that State.

The petitioners have requested a writ of certiorari to the California Supreme Court to review a peremptory writ of mandate in the case of *McFadden* v. *Jordan,* order dated September 3, 1948, opinion dated

August 3, 1948, and reported at 32 Adv. Cal. Reports, page 355 (196 Pac. 2d (Adv.) 787). The case was an original mandamus proceeding in the California Supreme Court instituted by McFadden, one of the respondents herein, to restrain the respondent Frank M. Jordan, as Secretary of State, from certifying an initiative measure for the ballot at the November, 1948, general election. The petitioners herein, as sponsors of the initiative proposal, intervened in that case to resist the issuance of the writ of mandate.

In view of the inaccuracies resulting from the incorporation of argumentative material in petitioners' statement of the case, we deem it necessary to set forth an additional statement, pursuant to Section 4 of Rule 27 of the court.

Pursuant to Article IV, Section 1, of the California Constitution, petitioners circulated an initiative petition proposing a number of amendments to the State Constitution. The initiative proposal bore the official designation: "Taxes, Gambling, Pensions, Etc. Initiative Constitutional Amendment." (Transcript of Record, pp. 14-30) and received sufficient electoral signatures to quality for the ballot at the November general election.

The California Supreme Court held that the initiative power reserved to the people by Article IV, Section 1, of the State Constitution applies only to the proposing and adopting or rejecting of "laws and amendments to the Constitution" and does not purport to extend to a constitutional revision. (Tran-

script of Record, p. 114.) The court determined that the measure proposed so many and such substantial changes in the State Constitution as to amount to a revision, rather than an amendment, of that organic law. The court stated that such a revision, as a single measure, could be submitted to the electorate only pursuant to a constitutional convention called pursuant to Article XVIII, Section 2 of the State Constitution. The basic method of revision through a constitutional convention, the court said, was not dispensed with by the initiative provisions of the Constitution. (Transcript of Record, pp. 131-132.) Accordingly, the court issued a peremptory writ restraining this respondent from certifying the initiative proposal for the ballot.

It is now settled in California that the courts possess the power by writ of mandate, to restrain the Secretary of State from submitting invalid initiative measures to the electors.

Boyd v. *Jordan,* 1 Cal. 2d 468 (35 Pac. 2d 533);
Clark v . *Jordan,* 7 Cal. 2d 248 (60 Pac. 2d 457, 106 ALR 549);
Epperson v. *Jordan,* 12 Cal. 2d 61 (82 Pac. 2d 445).

At the general election of November 2, 1948, the California electors approved and adopted the following amendment to Article IV of the State Constitution:

"Sec. 1c. Every constitutional amendment or statute proposed by the initiative shall relate to but one subject. No such amendment or statute

> shall hereafter be submitted to the electors if it embraces more than one subject, nor shall any such amendment or statute embracing more than one subject, hereafter submitted to or approved by the electors, become effective for any purpose."

Not being a part of the State Constitution at the time of the decision below, the above quoted provision was not a factor in arriving at that decision. We refer to it for a purpose which will be made apparent in the course of our argument.

II. ARGUMENT

Summary of the Argument

A. The court lacks jurisdiction because the questions presented are of a state and local character.

B. The court should not accept jurisdiction because of want of merit in the federal questions relied upon.

A. THE COURT LACKS JURISDICTION BECAUSE THE QUESTIONS PRESENTED ARE OF A STATE AND LOCAL CHARACTER

The petitioners' appeal to the jurisdiction of the court consists of a strange admixture of state and federal questions, interwoven with each other and with miscellaneous hyperbolic references to tyranny, judicial encroachments and infringements of democracy. Considered as a question of law, rather than an ideological appeal, the petition should be dismissed, either because there is no power in this court to re-examine the decision of the state court, or because of a want of merit in the federal questions relied upon.

While, to the superficial eye, petitioners' attack is aimed at the decision of the court below, the actual objective of the attack is the California Constitution as interpreted and applied by the Supreme Court of the State. In reviewing the decision of a state court, the Federal Supreme Court must accept the state tribunal's decision as to the meaning of the state constitution and is concerned solely with the effect and operation of the law as placed in force in the state. (*Thornton* v. *Duffy,* 245 U. S. 361; *Corn Products Refining Co.* v. *Eddy,* 249 U. S. 427.) The question then is not whether the decision of the court below is violative of federally-protected rights, but whether the initiative provisions of the California Constitution, as interpreted by the state court, are violative of those rights. Seen in this light, the question must be answered in the negative.

Suffrage is not attached to the individual as an inherent or natural right, but is an incident of state citizenship. In our federal system the electoral franchise does not have its source in the Federal Constitution, but instead is a privilege conferred by each state upon its own inhabitants, conditioned by definitions and qualifications expressed in state law and subject only to the requirements of the Fifteenth and Nineteenth Amendments that the right to vote shall not be abridged on account of race, color, previous condition of servitude or sex. (*United States* v. *Cruikshank,* 92 U. S. 542; *Guinn* v. *United States,* 238 U. S. 347; *Myers* v. *Anderson,* 238 U. S. 368.) Closely akin

to the electoral privilege, is the power of the citizens of some of the states to initiate direct legislation. The initiative power is a creature of state, not federal, law.

The initiative power was nonexistent in this country for 109 years following the establishment of the Federal Government. In 1898, South Dakota was the first state to adopt the initiative. *(The Book of the States* (Council of State Governments, Chicago, 1948), p. 155.) The initiative was established in California in 1911, through an amendment of the State Constitution. Approximately twenty out of the forty-eight have adopted the state-wide initiative. Additional states permit the initiative only at the county and city levels, while others have adopted the referendum only. *(Ibid,* pp. 155-160.) In the absence of a state provision authorizing the exercise of the initiative power, the power is nonexistent.

State v. *Hall,* 35 N. D. 34 (159 N. W. 281;
White v. *Welling,* 89 Utah 335 (57 Pac. 2d 703).

Under the circumstances, there is no conceivable basis for petitioners' argument that the power of California citizens to legislate or amend the State Constitution via the initiative is a right, privilege, or immunity guaranteed by any provision of the Federal Constitution or laws. A state may grant or withhold the initiative power, or through its courts chip away or undermine the power, without transgressing any federally protected right. Questions involving the construction and application of the initiative provisions of a state constitution are of a local and state

character and will not support a writ of error from the Federal Supreme Court to a state court.

Kiernan v. *Portland,* 223 U. S. 151.

The decision of the court below was concerned solely with the meaning and application of Article IV, Section 1, and Article XVIII, Section 2, of the California Constitution. The Federal Supreme Court cannot review a state court's construction of the constitution and laws of the State. *(Columbus Southern R. Co.* v. *Wright,* 151 U. S. 470; *Bi-Metallic Inv. Co.* v. *State Board of Equalization,* 239 U. S. 441.) Whether a state has, by its constitution, bestowed upon its people any particular part of the legislative power is a question of state law, a decision of which by the highest state court is conclusive on the subject.

Ohio ex rel. Davis v. *Hildebrant,* 241 U. S. 565.

We refer to Section 1c of Article IV of the California Constitution, which was adopted by the voters on November 2, 1948, (statement of the case, supra) and which hereafter limits state-wide initiatives to a single subject matter. This constitutional provision would obviously inhibit initiatives such as the hydra-headed proposal now before the court. Is this new provision of the State Constitution violative of any Federal right, privilege or immunity? If it is not, neither is the decision of the State Supreme Court which is here assailed by petitioners.

The only question before the court below was whether the California Constitution conferred upon

the people the power to exercise the particular manifestation of the initiative process attempted by petitioners. The inquiry was strictly a question of state constitutional law. It is respectfully submitted that the decision of the California Supreme Court on the question is conclusive and forecloses any inquiry by the Federal Supreme Court.

B. THE COURT SHOULD NOT ACCEPT JURISDICTION BECAUSE OF WANT OF MERIT IN THE FEDERAL QUESTIONS RELIED UPON

Upon a writ of certiorari to a state court, the right, privilege or immunity claimed under the Federal Constitution or laws must be specially claimed or set up in the court below to give the Supreme Court jurisdiction. (28 U. S. C. A., Sec. 1257, par. (3); *Cleveland, etc. R. Co.* v. *Cleveland,* 235 U. S. 50.) The Supreme Court acquires no jurisdiction unless the presentation of the federal question affirmatively appears upon the face of the record. *(Whitney* v. *California,* 274 U. S. 357.) The assertion of the claim must be made unmistakably and not left to inference. *(Michigan Sugar Co.* v. *Michigan,* 185 U. S. 112.)

An examination of the record below discloses that the intervenors (petitioners herein) asserted federal questions at only one point in the state court proceeding, in a supplemental memorandum of points and authorities. The only federal grounds urged were those allegedly arising under Article IV, Section 4, of the Federal Constitution and Section 1979, Revised Statutes (8 U.S.C.A., Sec. 43). (Transcript of Record, pp. 108-111.) The alleged invasion of rights arising

under the Ninth and Tenth Amendments is urged for the first time in the petition for certiorari in this court. Not having raised these Federal questions in the court below, petitioners are without standing to assert them here.

However this may be, petitioners' resort to the Ninth and Tenth Amendments is ill-taken. They contend that the decision of the court below is a judicial encroachment upon sovereign legislative functions reserved to the citizens of the state, thus violating the principle of separation of powers. Brief of Petitioners, pp. 16-17.) From this point, the argument branches in two directions. First, they assert that this judicial encroachment is violative of the Ninth and Tenth Amendments.* Petitioners bottom this assertion upon the supposed existence of a vast residuum of undefined and indefinable "rights" (including the right to initiate direct legislation), which are not delegated to the Federal Government, which are retained by or reserved to the people (as distinguished from the states), and which are protected from state action by the Ninth and Tenth Amendments. These amendments, according to petitioners, confirm in the people of each state whatever sovereign rights are reserved to them by their respective state constitutions. This argument is conceived out of thin air and begotten stillborn. It is hornbook law that the Ninth

* The Ninth Amendment declares: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

and Tenth Amendments do not limit the powers of the states in respect to their own people, but operate upon the Federal Government only. *(Lessee of Livingston* v. *Moore,* 32 U. S. (7 Pet.) 469; *McElvain* v. *Brush,* 142 U. S. 155; *Brown* v. *New Jersey,* 175 U. S. 172.) These amendments define the relationship of the Federal Government to the states and to the people, but do not regulate the relationship of a state to its own citizens. (See, *United States* v. *Darby,* 312 U. S. 100.) It is obvious that neither the decision of the court below nor the initiative provisions of the California Constitution, as construed and applied by that court, are violative of the Ninth or Tenth Amendments.

Secondly, they contend that this judicial restraint upon a legislative process is a departure from the republican form of government guaranteed by Section 4 of Article IV of the Federal Constitution. If the three powers of government in California are imperfectly separated, that is a matter of local, not federal, concern. *(Lessee of Livingston* v. *Moore,* supra, 32 U. S. (7 Pet.) 469.) If the California judiciary has so far intruded upon the legislative power that the state has lost its republican form of government, that is a question for Congress, not the Federal Supreme Court. *(Luther* v. *Borden,* 48 U. S. (7 How.) 1.) In the early days of the initiative and referendum, the power of direct legislation was attacked as violative of the republican form of government. In a series of decisions this court held that the question was

political and not a subject for judicial inquiry. (*Pacific States Tel. and Tel Co.* v. *Oregon,* 223 U. S. 118; *Kiernan* v. *Portland,* supra, 223 U. S. 151; *Ohio ex rel. Davis* v. *Hildebrant,* supra, 241 U. S. 565.) While petitioners' argument stands in refreshing contrast to these earlier assertions, it is equally groundless as an appeal to the exercise of jurisdiction by the court. If, in the light of Article IV, Section 4, a *grant* of the initiative power raises a political question, so does a *limitation* upon that power.

From their statement of the questions presented (Brief of Petitioners, p. 11) petitioners apparently attack the decision of the lower court on the basis of alleged "constitutional rights" guaranteed them by 28 U. S. C. A., Section 1257 (being a statement of the grounds upon which certiorari will lie to a state court) and 8 U. S. C. A., Section 43 (R. S. Sec. 1979; the Civil Rights Act). As is obvious from a reading of these statutes, they do not of themselves establish any substantive right, privilege or immunity, but are merely jurisdictional and procedural in nature. We have been unable to discover any case in which the Civil Rights Act has been used as the basis for the issuance of a writ of certiorari or writ of error from this court to a state tribunal. Considered substantively, the Civil Rights Act concerns only the rights, privileges and immunities of national citizenship secured by the Fourteenth Amendment, but does not include rights pertaining to state citizenship and derived solely from the relationship between the citizen

and his state established by state law. *(Snowden* v. *Hughes,* 321 U. S. 1; see, also, *Hague* v. *C.I.O.,* 307 U. S. 496.) Petitioners do not claim any violation of the Fourteenth Amendment, nor does any exist. If there be any violation, it is of a right of state citizenship and not of any right, privilege or immunity of national citizenship. The statutes relied upon by petitioners thus lend no support to their plea.

The federal questions urged by petitioners, may, in part, not be heard because not raised or considered in the state court. They are, as to all of them, devoid of merit.

III. CONCLUSION

This respondent urges that the questions presented by petitioners are of a purely state character, not federal, and that the petition for the writ of certiorari should be dismissed.

Respectfully submitted,

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APPENDIX

California Constitution, Article IV, Section 1.

"The legislative power of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature.

"The enacting clause of every law shall be 'The people of the State of California do enact as follows:'.

"The first power reserved to the people shall be known as the initiative. Upon the presentation to the Secretary of State of a petition certified as herein provided to have been signed by qualified electors, equal in number to eight percent of all the votes cast for all candidates for Governor at the last preceding general election, at which a Governor was elected, proposing a law or amendment to the Constitution, set forth in full in said petition, the Secretary of State shall submit the said proposed law or amendment to the Constitution to the electors at the next succeeding general election occurring subsequent to one hundred thirty days after the presentation aforesaid of said petition, or at any special election called by the Governor in his discretion prior to such general election. All such initiative petitions shall have printed across the top thereof in twelve-point blackface type the following: 'Initiative measure to be submitted directly to the electors.' * * *"

California Constitution, Article XVIII, Section 2.

"Whenever two-thirds of the members elected to each branch of the Legislature shall deem it necessary to revise this Constitution, they shall recommend to the electors to vote at the next general election for or against a Convention for that purpose, and if a majority of the electors voting at such election on the proposition for a Convention shall vote in favor thereof, the Legislature shall, at its next session, provide by law for calling the same. * * *"

United States Constitution, Article IV, Section 4

"1. The United States shall guarantee to every State in this Union a republican form of Government, and shall protect each of them against invasion; and on application of the Legislature, or of the executive (when the Legislature cannot be convened) against domestic violence."

U.S.C.A., Title 8, Section 43.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

U.S.C.A., Title 28 Section 1257 (3)

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"* * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

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